# STATE OF MICHIGAN

# COURT OF APPEALS

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JAMES HOFFMAN and JULIE HOFFMAN,

Plaintiffs-Appellees,

v

CONSUMERS ENERGY COMPANY,

Defendant-Appellant,

UNPUBLISHED
May 24, 2012

No. 300577
Macomb Circuit Court
LC No. 2010-002808-NO

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JAMES HOFFMAN and JULIE HOFFMAN,

Plaintiffs,

and

STATE FARM FIRE AND CASUALTY COMPANY,

Intervening Plaintiff-Appellee,

v

CONSUMERS ENERGY COMPANY,

Defendant-Appellant,

and

DRESSER, INC.,

Defendant.

No. 301977
Macomb Circuit Court
LC No. 2010-002808-NO

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Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant, Consumers Energy Company, appeals by leave granted orders denying its motions for summary disposition in this negligence case.[1] We reverse and remand.

On February 11, 2009, plaintiffs' house exploded.[2] After investigation, it was determined that the explosion was caused by a natural gas leak. Subsequently, plaintiffs sued defendant, the provider of their natural gas service. Plaintiffs alleged that the natural gas leaked at a compression fitting that attached a service pipeline to defendant's main pipeline located beneath the street in front of plaintiffs' house. That service pipeline had been installed in 1956 but, in 1966, according to defendant's report, a gas leak on the same service pipeline was "repaired" at the subject connection. Plaintiffs alleged that defendant's negligent repair of the service pipeline caused the explosion. Subsequently, plaintiffs' insurance provider, State Farm Fire & Casualty Company, intervened in this lawsuit. Defendant filed a notice of non-party fault as to Dresser, Inc., which manufactured and supplied the compression fitting and related parts that were allegedly used to repair the service pipeline. Thereafter, plaintiff added Dresser, Inc. as a defendant in this matter through the filing of a third amended complaint, and intervening plaintiff, State Farm, followed suit with the filing of its first amended complaint.

In response to plaintiffs' and intervening plaintiff's complaints, defendant moved for summary disposition under MCR 2.116(C)(7), (8), and (10). Defendant argued that this negligence action was barred by the statute of repose, MCL 600.5839, because it was a "contractor" when it made this "improvement" in 1966. In the alternative, defendant argued, there was no genuine issue of material fact that it did not owe a duty to protect plaintiffs against unforeseeable incidents like this explosion which occurred 43 years after the gas pipeline was "repaired." That is, to hold defendant liable for such an incident is tantamount to imposing strict liability when injuries are allegedly caused by public utilities like defendant which serves 1.5 million customers through about 26,404 miles of gas distribution mains in this State. Thus, defendant argued, summary dismissal of this negligence action was proper.

Plaintiffs opposed defendant's motions, arguing that the statute of repose did not apply because defendant was not a "contractor" and the case arose from a negligent repair, not "an improvement to real property." Further, defendant clearly owed plaintiffs a duty to properly install and repair its gas pipelines; it was foreseeable that an improperly installed connection would fail. Thus, plaintiffs argued, defendant's motions for summary disposition should be denied.

The trial court agreed with plaintiffs holding, in pertinent part, that the statute of repose did not apply because at issue was an ordinary repair, not "an improvement to real property" and defendant was an "owner" of the easement and gas pipelines, not a "contractor." Further, the court held that defendant owed plaintiffs a duty to maintain its service lines and that a gas leak arising from corrosion of a gas line or a connection was a foreseeable occurrence. Thus,

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[1] We refer to Consumers Energy Company as "defendant" in this opinion.

[2] Our reference to "plaintiffs" means the homeowners, James and Julie Hoffman, and when we refer to "intervening plaintiff," we mean State Farm Fire & Casualty Company.

defendant's motions for summary disposition were denied. Defendant filed applications for leave to appeal, at separate times, challenging the denial of its motions for summary disposition. These applications were granted and the appeals were consolidated.

On appeal, defendant argues that this negligence action was barred by the statute of repose, MCL 600.5839, and the trial court's erroneous construction of the statute must be reversed. We agree.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion for summary disposition under MCR 2.116(C)(7), we accept well-pleaded allegations as true and consider the pleadings, as well as the documentary evidence, in the light most favorable to the nonmoving party. *Zwiers v Growney*, 286 Mich App 38, 42; 778 NW2d 81 (2009); *Dewey v Tabor*, 226 Mich App 189, 192; 572 NW2d 715 (1997). If the facts are not in dispute, the issue whether the claim is statutorily barred is one of law for the court. *Id*.

The issue on appeal requires interpretation of the statute of repose. This Court reviews de novo issues of statutory interpretation. *Bloomfield Twp v Oakland Co Clerk*, 253 Mich App 1, 9; 654 NW2d 610 (2002). Our purpose in reviewing questions of statutory construction is to discern and give effect to the Legislature's intent through reasonable construction in consideration of the purpose of the statute and the object sought to be accomplished. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005); *Gross v General Motors Corp*, 448 Mich 147, 158-159; 528 NW2d 707 (1995). Our analysis begins by examining the plain language of the statute; if the language is unambiguous, no judicial construction is required or permitted and the statute must be enforced as written. *Echelon Homes, LLC*, 472 Mich at 196, quoting *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). Statutes of repose, like statutes of limitation, are construed to advance the policy that they are designed to promote. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998).

The relevant statute of repose, MCL 600.5839(1), provides:

> No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of the improvement, or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than ten years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

Defendant argues that this negligence action arising from its allegedly defective repair of a service gas pipeline was barred because it was a "contractor" when it made this "improvement to real property" in 1966. That is, when defendant repaired the service pipeline, it was acting as a contractor and should be afforded the protection of the statute of repose. Thus, we must first determine whether defendant was a "contractor" within the contemplation of this statute.

The statute of repose defines the term "contractor" as "an individual, corporation, partnership, or other business entity which makes an improvement to real property." MCL 600.5839(4). "When a statute specifically defines a given term, that definition alone controls." *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). In *Frankenmuth Mut Ins Co*, 456 Mich at 511, our Supreme Court held that the focus of this definition is "on whether a defendant 'makes an improvement to real property.'" *Id*. at 518 n 8. Plaintiffs argued in the trial court and argue here on appeal that defendant was not a "contractor," it was the owner of the gas pipeline; accordingly, the statute of repose does not apply to defendant.

In support of its claim, plaintiffs rely on a premises liability theory.[3] However, "[i]n a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land." *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). In this case, the theory of liability alleged by plaintiffs was that defendant's *conduct* was negligent; specifically, its repair of the gas pipeline in 1966 was negligent. This is a claim of defective workmanship,[4] not a claim premised "merely on defendant's duty as an owner, possessor, or occupier of land." *Id*. The definition of "contractor" reflects the Legislature's intent that conduct, and not mere ownership, is the relevant consideration with regard to the application of the statute of repose. Our Supreme Court has recognized this intention by holding that the focus of this definition is "on whether a defendant '*makes* an improvement to real property.'" *Frankenmuth Mut Ins Co*, 456 Mich at 518 n 8. This interpretation also comports with the purpose of the statute of repose which is to protect contractors from stale claims and eliminate open-ended liability for defects in *workmanship*. *Pendzsu v Beazer East, Inc*, 219 Mich App 405, 410; 557 NW2d 127 (1996). Accordingly, if defendant made an improvement to real property when it repaired the gas service pipeline, it was a "contractor" within the contemplation of the statute of repose.

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[3] See, e.g., *Ali v Detroit*, 218 Mich App 581, 586; 554 NW2d 384 (1996) (whether the public building exception to governmental immunity applied with regard to a negligence action premised merely on the defendant city's alleged ownership of a defective passenger bus shelter that it did not build); *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 340; 568 NW2d 847 (1997) (a case, in relevant part, asserting a premises owner liability claim against an apartment complex premised on the installation of allegedly ineffective erosion control measures that the apartment complex owner did not install).

[4] As explained in *Citizens Ins Co v Scholz*, 268 Mich App 659, 670; 709 NW2d 164 (2005), "the term 'workmanship' encompasses not only the quality of the finished product, but the manner of construction as determined by the 'art, skill, or technique of [the] workman.'" (citation omitted).

The statute of repose does not set forth a definition for the phrase "improvement to real property." However, this phrase has been construed by this Court on more than one occasion. In *Pitsch v ESE Michigan, Inc*, 233 Mich App 578; 593 NW2d 565 (1999), quoting *Travelers Ins Co v Guardian Alarm Co of Mich*, 231 Mich App 473; 586 NW2d 760 (1998),[5] this Court stated:

> An improvement is a "permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." *Pendzsu*, [219 Mich App] at 410. The test for an improvement is not whether the modification can be removed without damage to the land, but whether it adds to the value of the realty for the purposes for which it was intended to be used. *Id*. at 410-411. In addition, the nature of the improvement and the permanence of the improvement should also be considered. *Id*. at 411. Furthermore, if a component of an improvement is an integral part of the improvement to which it belongs, then the component constitutes an improvement to real property. *Id*. [*Pitsch*, 233 Mich App at 601, quoting *Travelers Ins Co*, 231 Mich App at 478.]

More specifically, with regard to determining whether work constitutes an "improvement" rather than a repair, the *Pendzsu* Court further explained that the work must be considered in light of the system, not just as a component of the system because improvements to real property typically consist of a complex system of components. *Pendzsu*, 219 Mich App at 411, quoting *Adair v Koppers Co, Inc*, 741 F2d 111, 115 (CA 6, 1984). "[T]o artificially extract each component from an improvement to real property and view it in isolation would be an unrealistic and impractical method of determining what is an improvement to real property." *Pendzsu*, 219 Mich App at 411, quoting *Adair*, 741 F2d at 115.

Here, defendant argues that the modification it made to the gas service pipeline in 1966 was an "improvement" because it was an integral component of the previously installed pipeline which was itself an "improvement to real property." Plaintiffs argue that a "repair" is not "an improvement to real property." Although plaintiffs are correct that a "repair" to a product in and of itself may not be considered an "improvement" within the contemplation of the statute of repose, plaintiffs' characterization does not account for the circumstances presented in this case. The gas service pipeline was installed by defendant in 1955 and it is undisputed that it constituted "an improvement to real property." In 1966, there was a gas leak from the pipeline, which obviously required that defendant take action to stop. Thus, defendant installed a new service pipeline and associated parts, which permitted the continued safe transport of natural gas. These modifications to the underground pipeline were integral to the system, allowed natural gas

[5] *Travelers Ins Co*, 231 Mich App at 473, was overruled in part on other grounds by *Miller-Davis Co v Ahrens Const Inc*, 489 Mich 355, 371; 802 NW2d 33 (2011); however, *Travelers Ins Co* relied extensively on the holding of *Pendzsu*, 219 Mich at 410-411, with regard to the interpretation of "improvement" under the statute of repose and that case has not been overruled.

to be safely transported to consumers, were permanent in nature, and enhanced the use of, as well as added value to, the benefitted properties.

The facts in this case are similar to those of *Pendzsu*, 219 Mich App at 405. In *Pendzsu*, the defendant installed certain ovens and blast furnaces that were relined about thirty years later. *Id*. at 411-412. The relining process required the rebuilding of brick within the ovens and furnaces because the brick wears out with continued use. *Id*. It was undisputed that the installation of the ovens and furnaces were "improvements," but the plaintiff argued that the relining of the ovens itself did not constitute "improvements" within the contemplation of the statute of repose; rather, the relining was "repair work." *Id*. at 409, 412. The *Pendzsu* Court rejected the plaintiff's argument, holding that the permanency of a component is not dispositive; rather, it was "merely one of the factors considered in determining whether a modification adds to the value of the realty for the purposes for which it was intended to be used." *Id*. at 412. Considering the system as a whole, the Court concluded that the relining of the ovens and blast furnaces was "integral" to the usefulness of the benefitted properties; thus, the work constituted an "improvement" within the contemplation of the statute of repose. *Id*.

Here, plaintiffs argue that the statute of repose is inapplicable because their injuries did not arise out of "the defective and unsafe condition of an improvement to real property." MCL 600.5839(1). They claim that their injuries arose from an explosion caused by a natural gas leak that occurred as a result of a negligently repaired pipeline and the repair itself did not constitute "an improvement to real property." But plaintiffs' argument assumes that any subsequent modification of the original "improvement to real property" is merely a "repair." However, permanency of each component of the original improvement is only one factor to consider with regard to the analysis. In this case, the pipeline at issue was integral to the underground natural gas pipeline distribution system which allowed plaintiffs and others to have natural gas on their adjacent properties, in their residences. If defendant had not modified the pipeline, so as to permit the safe transport of natural gas as was its intended use, plaintiffs and others likely would not have had natural gas in their homes. Accordingly, consistent with the holding in *Pendzsu*, we conclude that the statute of repose applies under the circumstances of this case and bars plaintiffs' action. In light of our resolution of this issue, we need not consider defendant's other issue on appeal.

Reversed and remanded for entry of an order granting defendant's motions for summary disposition. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood